(34)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 721

CAPITOL WINE & SPIRIT CORPORATION,
Petitioner,

vs.

STEWART BERKSHIRE, as Deputy Commissioner of the Bureau of Internal Revenue, in Charge of the Alcohol Tax Unit, HENRY MORGENTHAU, JR., as Secretary of the Treasury, and B. R. Rhees, as District Supervisor of the Alcohol Tax Unit, Bureau of Internal Revenue, Second District of New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Joseph P. Tumulty, Jr.,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 721

CAPITOL WINE & SPIRIT CORPORATION,
Petitioner,

vs.

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, IN CHARGE OF THE ALCOHOL TAX UNIT, HENRY MORGENTHAU, JR., AS SECRETARY OF THE TREASURY, AND B. R. RHEES, AS DISTRICT SUPERVISOR OF THE ALCOHOL TAX UNIT, BUREAU OF INTERNAL REVENUE, SECOND DISTRICT OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Capitol Wine & Spirit Corporation, respectfully prays that a writ of certiorari be issued to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit filed in the above

proceeding on October 8, 1945 (R. 359), which judgment and decree affirmed the orders dated October 11, 1943 (R. 303), and March 17, 1944 (R. 338) issued by these respondents.

I. Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit, rendered by Swan, J., is reported in 150 F(2nd) at 619, and is printed in the record (R. 346).

II. Summary Statement of the Matter Involved

The matter involves orders issued by the respondents annulling, for alleged fraud, misrepresentation or concealment of material facts in its procurement, a basic permit as a wholesaler of distilled spirits, wine and malt beverages issued under the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C. Sec. 201) on March 1, 1936 (R. 196), to the petitioner, an importer and wholesaler of liquor.

The petitioner was on May 25, 1935, and still is, a possessor and holder of a basic permit as an importer of liquors issued by the Federal Alcohol Administration on February 1, 1934 (R. 12-13).

A Wholesaler's Basic Permit was issued by the same authority to petitioner on July 1, 1936 (R. 196), on an application therefor dated January 28, 1936 (R. 175).

Petitioner has been engaged in the liquor wholesaling and importing business since 1934. It had been engaged in said business for nine years prior to the institution of the proceeding for the annulment of its Wholesaler's Basic Permit.

Petitioner has an annual volume of business in excess of $15,000,000, employs approximately 350 people, and operates offices and warehouses in New York City, Buffalo, Rochester and Newburgh, in the State of New York (R. 139).

Petitioner has been regularly conducting its business pending the final determination of these proceedings. No charges have ever been instituted against petitioner for suspension or revocation of its permits [1] and there is no suggestion in the record that its operations in the period prior to the institution of the annulment proceeding were not in entire conformity with the law.

On January 4, 1943, the District Supervisor of the Alcohol Tax Unit, Bureau of Internal Revenue, Second District of New York, instituted a proceeding for the annulment of petitioner's Wholesaler's Basic Permit. The citation issued by the District Supervisor ordered petitioner to show cause why such permit should not be annulled and stated that the District Supervisor had reason to believe that the permit was procured through fraud or misrepresentation or concealment of material facts (R. 165). Hearing pursuant to the order was held before Frederick D. Silloway, Esquire, an attorney in the Alcohol Tax Unit, who was designated as the Hearing Officer by the District Supervisor of the Alcohol Tax Unit (R. 164). With respect to this proceeding petitioner in its brief in the court below stated, on page 48 thereof: " * * * The Respondent Rhees, who issued the citation and, therefore, acted the part of the complainant, designated Smith, a lawyer on his staff, to prosecute the charges before another lawyer on his staff named Silloway, who sat as the Hearing Officer. The Respondent Rhees, therefore put himself in the very obvious category of being the complainant, the prosecutor and the judge."

On October 9, 1943, the Hearing Officer rendered his findings and recommended that petitioner's Wholesaler's Basic Permit be annulled (R. 257).

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[1] This statement is based upon a statement "*in haec verba*" in petitioner's brief in the court below on page 46 thereof.

On October 11, 1943, respondent Rhees, the District Supervisor, adopted the findings of the Hearing Officer and issued an order annulling the petitioner's Wholesaler's Basic Permit for fraud, misrepresentation and concealment of material facts (R. 303).[2] Petitioner applied for reconsideration of this order and on December 2, 1943, the District Supervisor, after hearing oral argument, affirmed the order (R. 322).

Petitioner sought review of the findings and order by respondent Berkshire, the Deputy Commissioner of Internal Revenue in charge of the Alcohol Tax Unit (R. 325), which review resulted in an order dated March 17, 1944, affirming the orders and action of the District Supervisor in annulling petitioner's Wholesaler's Basic Permit (R. 338).

The Deputy Commissioner of Internal Revenue made no independent findings, but merely found (R. 339) that "*the findings and the aforesaid orders of said District Supervisor were supported by substantial evidence in the record and by provisions of the Federal Alcohol Administration Act and existing regulations and that the orders in question were not of an arbitrary nature and that the procedure and the District Supervisor's action in annulling the aforesaid basic permit were not contrary to law and regulations*" (Italics supplied).

No proceedings were brought by respondents to annul or revoke petitioner's Importer's Basic Permit issued on February 1, 1934, by the Administrator of the Federal Alco-

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[2] It will be noted that the District Supervisor adopted the Hearing Officer's findings within two days after their issuance and, under the administrative procedure followed in this case, without previously affording petitioner any opportunity for the submission of exceptions or objections thereto. In applying to the District Supervisor for reconsideration petitioner was, therefore, required to assume the burden of persuading the District Supervisor to reverse himself upon a matter already decided by him and made a matter of record.

hol Control Administration, an agency of the Federal Government (R. 12-13).

The orders appealed from annul petitioner's Wholesaler's Basic Permit for reasons which may be sumarized as follows (R. 304-6):

(a) That the applicant (petitioner) procured such permit through fraud, or misrepresentation, or concealment of material facts;

(b) That the application failed to reveal, or misrepresented or concealed the interests in applicant of Louis Pokrass, Charles D. Cook and Harry Davis;

(c) That the application represented Bentesan Weisman as the owner of 50 shares of applicant's stock, Louis Spiegel as the owner of 500 shares, Lily Pokrass as the owner of 475 shares, Helen Cook as the owner of 325 shares, and Hyman Ripstein as the owner of 500 shares, whereas said persons were not the true owners in fact of said stock, but held the same for and on behalf of hidden parties in interest who were the actual owners thereof and whose financial interests in applicant were concealed;

(d) That the application represented Charles D. Cook as the owner of less than 10% of the applicant's stock whereas in fact he was the owner of one-third of the aplicant;

(e) That the application failed to state that the stock held by all the stockholders of record was transferred to voting trustees who held the stock for the benefit of persons not disclosed in the application;

(f) That the application stated that neither the applicant nor any person mentioned in certain items of the application had ever been for five years prior to the application convicted of felony under Federal or State laws whereas in fact Charles D. Cook was on May 20, 1932,

convicted of a felony in the United States District Court for the Western District of New York; and

(g) That the application stated that Charles D. Cook had no experience pertaining to the manufacture and distribution of intoxicating liquors and that none of the officers and stock holders of applicant had any experience pertaining to the manufacture and distribution of intoxicating liquors whereas in fact two of the real owners, Charles D. Cook and Harry Davis, were engaged in illict operations during Prohibition.

The application was executed by S. N. C. Marshuetz, Vice President of the petitioner, on January 21, 1936 (R. 194).

The theory underlying the charges made by the District Supervisor was that Louis Pokrass, Charles D. Cook and Harry Davis were the real owners of petitioner, the persons named as stockholders in petitioner's application for the basic permit being mere dummies; and that the concealment of the interests of the alleged real owners was motivated by the fact that they had been engaged in illicit liquor operations during Prohibition.[3]

The pivotal issue of fact litigated before the Hearing Officer was as to whether said Pokrass, Cook and Davis were the real owners of petitioner when application was made, or not. If they were not, then their prior activities would be immaterial.

Petitioner contended at all stages of the administrative proceeding that the stockholders of the petitioner

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[3] As to alleged illicit activities of Pokrass, Cook and Davis, it may be noted (1) the Hearing Officer found as to Pokrass that nothing in the record indicated "that he was not eligible for a permit at the time the application was filed" (R. 275); (2) of the three only Cook, named as a stockholder in the application, was shown ever to have been convicted, viz., a single conviction for transportation, occurring about four years before the application. The court below found the offense to have been a felony, petitioner contending it was a misdemeanor.

when the application was made were the persons named as such in the application and that the Government's evidence failed to show that the aforesaid Pokrass, Cook and Davis were the owners of the petitioner (R. 277-8, 313, 330). Petitioner further contended that an order annulling an application must meet a high standard of certainty and that before the Commissioner could annul a permit justification for a finding of fraud, misrepresentation, or concealment must clearly appear (R. 205, 313, 330). Petitioner also contended at all stages of the administrative proceeding that it was entitled to a Wholesaler's Basic Permit as a matter of right (R. 13, 308, 326).

In its petition for review by the court below, petitioner called attention to the official connection between the Hearing Officer and the District Supervisor (R. e) and contended that the orders appealed from were arbitrary and capricious (R. j).

III. Jurisdiction of This Court

The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 347(a) (Judicial Code, Sec. 240(a) amended), and under Sec. 4(h) of the Federal Alcohol Control Administration Act (49 Stat. 977, 27 U. S. C., Sec. 204(h)). The order and decree to be reviewed was filed on October 8, 1945 (R. 359). The petition is timely within the requirements of Title 28, U. S. C., Sec. 350 (Judicial Code, Sec. 243).

IV. Statute and Regulations Involved

Section 3 of the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C., Sec. 203) in substance makes it unlawful to operate a liquor business without obtaining a basic permit. Section 4 of the Federal Alcohol Adminis-

tration Act (27 U. S. C., Sec. 204) specifies who are entitled to basic permits. Relevant provisions of the statute are:

"Section 204. Permits

"(a) Who Entitled Thereto. The following persons shall, on application therefor, be entitled to a basic permit:

"(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

"(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted * * *

"(e) Revocation, Suspension and Annulment. A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, * * * or (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

"(h) Appeal; Procedure. An appeal may be taken by the permittee or applicant for a permit from any order

of the Secretary of the Treasury denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be modified or set aside in whole or in part * * *. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive * * *. The judgment and decree of the court affirming, modifying or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 346 and 347 of this Title * * *."

Applicable portions of the regulations involved in this case are set out in the appendix.

The 21st Amendment to the Constitution became effective December 5, 1933. At that time the National Industrial Recovery Act (48 Stat. 195) was in effect and regulation of the liquor industries was placed under Codes of Fair Competition provided for by such Act. By executive order of the President an administrative board known as the Federal Alcohol Control Administration was created. Permits to engage in the various liquor industries were issued under such Codes to distillers, rectifiers, wine producers, bottlers, warehousemen and wholesalers. All of

such permits, except the wholesale permits, were issued by the Administrator of the Federal Alcohol Control Administration after investigation of the applicants by federal agencies. The permits to wholesalers were issued by the Wholesale Code Authority.

On May 26, 1935, the Supreme Court of the United States rendered its decision in the case of *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, which nullified the National Industrial Recovery Codes and had the effect of terminating the control of the Federal Alcohol Control Administration. Following this the Federal Alcohol Administration Act was passed by Congress on August 29, 1935.

By the Reorganization Act of 1939, the Reorganization Plan No. III (H. R. Doc. No. 681, 76th Cong., 3rd Sess.) prepared by the President and transmitted by him to Congress on April 2, 1940, and the Joint Resolution of June 4, 1940 (Pub. Res. No. 75, 76th Cong., 3rd Sess.), it was provided, effective on June 30, 1940, that:

> "The Federal Alcohol Administration, the offices of the members thereof, and the office of the Administrator are abolished, and their functions shall be administrated under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue in the Department of Treasury."

By Treasury Order No. 30 of the Secretary of the Treasury, effective June 30, 1940, the aforesaid functions of the aforesaid former Administration and of its members and Administrator were delegated to the Deputy Commissioner of Internal Revenue in Charge of the Alcohol Tax Unit, Treasury Department. (Code of Federal Regulations, Title 26, Part 171, Subpart B, Section 171.4a; 5 Fed. Reg. 2212).

Subsequently, by regulation, the power and duty to annul basic permits under the provisions of the Federal Alcohol Administration Act theretofore vested in the aforesaid Deputy Commissioner by the aforesaid Treasury Order were also delegated to the District Supervisors of the Alcohol Tax Unit, to be exercised by them, subject to the supervision and direction of the said Deputy Commissioner. (Code of Federal Regulations, Title 26, Part 171, Subpart B–1, Section 171.4(c) (T.D. 4982); 5 Fed. Reg. 2549).

V. Questions Presented

The following questions are presented:

1. Did the administrative procedure followed by the Bureau of Internal Revenue, Alcohol Tax Unit for determining the basic and essential finding that the petitioner's permit was procured by fraud, or misrepresentation, or concealment of material fact accord petitioner the hearing to which petitioner was entitled under Section 204(e) of the Federal Alcohol Administration Act?

2. Was petitioner entitled to a Wholesaler's Basic Permit as a matter of right under Section 204(a)(1) of Federal Alcohol Administration Act since it held on May 25, 1935, a basic permit as an importer of liquor issued by the Federal Alcohol Administration.

VI. Reasons for Allowance of Writ

1. Important questions of administrative law are involved. The decision of the court below, and the challenge made in this petition to the procedure followed by the Bureau of Internal Revenue, Alcohol Tax Unit, in annulling petitioner's basic permit, raise fundamental questions of substance and procedure under the Federal Alcohol Administration Act. Such issues present sufficient reason for

granting certiorari. *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 84 L. Ed. 656, 60 Sup. Ct. 437; *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 Sup. Ct. 693; rehearing denied, 309 U. S. 642, 84 L. Ed. 1037, 60 Sup. Ct. 693.

Section 204 (e)(3) of the Act provides that a basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. It further provides that the order shall state the findings which are the basis for the order.

Section 204(h) provides for judicial review of any order annulling a basic permit but provides that the findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

No administrative procedure is statutorily prescribed. Congress plainly intended to impose upon the Secretary a quasi-judicial function in respect of the annulment of a basic permit. The Secretary was bound to provide a proper quasi-judicial hearing process for determining the basic and essential fact as to the existence or non-existence of fraud, or misrepresentation, or concealment of material fact in the procurement of a basic permit sought to be annulled.

The procedure prescribed failed to accord petitioner and other permittees the opportunity for a fair quasi-judicial determination of the basic and essential facts upon which valid exercise of the power of annulment depends.

Under the procedure provided by regulations promulgated by the Secretary and applied in this case, the function of adjudication as to the existence of fraud, misrepresentation, or concealment of material fact has been delegated

to the District Supervisor. That official is also clothed with the functions of instituting annulment proceedings, after forming an opinion that good cause for annulment exists, and of prosecuting annulment cases. Such a union of the prosecuting and adjudicating functions, although not in itself improper in administrative proceedings, necessitated the provision by the Secretary of an adequate review procedure, whereby the decisions of the District Supervisor would be open to a review adequate in scope by the Deputy Commissioner.

Under the hearing procedure prescribed and followed the District Supervisor's determination is subject only to limited review by the Deputy Commissioner. The scope of such review is confined to the determination as to whether the evidence was sufficient, if the case were tried to a jury, to justify a refusal to direct a verdict for the defendant. This limitation has the effect of vesting in the District Supervisor power conclusively to determine the issues of fact upon which the power of annulment depends.

In providing and applying such hearing procedure the Secretary has failed to fulfill the purpose and intention of Congress. The Circuit Court of Appeals, in refusing to reverse the action of the respondents, has in effect approved such failure to grant petitioner an opportunity for a fair hearing on the issues of ultimate fact on which petitioner's economic life or death hangs.

The determination as to whether petitioner has received the hearing granted by Section 204(e) of the Act is no intrusion upon the administrative domain. It is no more or no less than the insistence upon the observance of that which Congress has made prerequisite to the annulment of petitioner's permit. See *Howard Hall Co.* v. *U. S.*, 315 U. S. 495, 62 S. Ct. 732, 86 L. Ed. 986; *U. S.* v. *Carolina Freight Carriers Corporation,* 315 U. S. 475, 475, 62 S. Ct.

722, 86 L. Ed. 971; *Ashbacker Radio Corp.* v. *Federal Communications Commission*, U. S. Supreme Court, 1945 Term, No. 65, decided December 3, 1945, reported in 90 L. Ed. 119, 66 Sup. Ct. 148.

2. In refusing to hold that the petitioner was entitled to a Wholesaler's Basic Pemit as a matter of right the court below has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Section 204 (a)(1) of the Act provides in plain and clear language that the holder of a basic permit as a distiller, rectifier, wine producer or importer on May 25, 1935, is entitled as a matter of right to another basic permit. It does not limit the type of other basic permits to which a holder is entitled.

The administrative agency has, however, limited the statutory right to basic permits of the same class only.

The court below has failed to follow the clear language of the statute. The court has thereby ruled in effect that an administrative agency may by regulation, alter, amend or extend a statute. Its decision to that extent failed to follow and is in conflict with the rules established by this Court in *Morrill* v. *Jones*, 106 U. S. 466, 27 L. Ed. 267, 1 Sup. Ct. 423; *U. S. et al.* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 73 L. Ed. 322, 49 Sup. Ct. 133; *U. S.* v. *Goldenberg*, 168 U. S. 95, 42 L. Ed. 394, 18 Sup. Ct. 3; *Palmer* v. *Hoffman*, 318 U. S. 109, 114, 87 L. Ed. 645, 63 Sup. Ct. 477; *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 88 L. Ed. 428, 64 Sup. Ct. 1215.

The Court in these cases firmly established the rule that where no ambiguity exists there is no room for construction, and further, that an administrative agency cannot by its regulations engraft into the body of a statute a limitation which Congress did not think it necessary to prescribe.

3. The answer to the questions herein presented affect numerous applicants and holders of permits throughout the United States. The public importance of the questions, therefore, is obvious. Research fails to disclose that the Court has yet construed the sections of the statute under consideration by this petition or judicially commented on the powers exercised thereunder by the administrative agency, although the construction and proper exercise of power thereunder governs the issuance and annulment of permits involving a large number of business owners located throughout the Nation, employing thousands in help and owning investments of many millions of dollars. This Court will grant a writ of certiorari where an interpretation of an important provision of a Federal statute and the powers of a Federal administrative agency thereunder are involved. It has likewise been held that such a writ will be granted where a decision with respect to the enforcement of such a statute and such powers constitutes a precedent of general application. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285, 80 L. Ed. 229, 56 Sup. Ct. 190.

It is respectfully submitted that this petition for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit should be granted, and the judgment and decree of the Circuit Court should be reversed.

JOSEPH P. TUMULTY, JR.
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 721

CAPITOL WINE & SPIRIT CORPORATION,
Petitioner,

vs.

STEWART BERKSHIRE, as Deputy Commissioner of the Bureau of Internal Revenue, in Charge of the Alcohol Tax Unit, HENRY MORGENTHAU, JR., as Secretary of the Treasury, and B. R. RHEES, as District Supervisor of the Alcohol Tax Unit, Bureau of Internal Revenue, Second District of New York.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the United States Court of Appeals for the Second Circuit is reported officially in 150 F(2d) at 619, and is printed in the record (R. 346).

II. Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 347(a) (Judicial Code Sec. 240(a) amended) and under Section 4(h) of the Federal Alcohol

Administration Act (49 Stat. 977, 27 U. S. C., Sec. 204(h)).

The judgment and decree to be reviewed was filed in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit on October 8, 1945 (R. 359). The foregoing petition is timely within the requirements of Title 28, U. S. C., Sec. 350 (Judicial Code, Sec. 343).

III. Summary Statement of the Case

A summary statement of the matter involved has been made in the foregoing petition for writ of certiorari and, in the interest of brevity, is hereby adopted and made a part of this brief as a statement of the case.

IV. Specification of Errors to Be Urged

The United States Circuit Court of Appeals has erred in the following respects:

1. In failing to hold that the petitioner was denied the hearing to which it was entitled by Section 204(e) of the Federal Alcohol Administration Act.

2. In holding that the petitioner was not entitled to a Wholesaler's Basic Permit as a matter of right.

3. In holding that the orders of respondents annulling the Wholesaler's Basic Permit of petitioner should be affirmed.

V. Summary of Argument

Point I. Petitioner was Denied the Hearing to which it was Entitled under Sec. 204(e) of the Federal Alcohol Administration Act.

The statute guarantees to petitioner a fair hearing. Such a hearing requires a quasi-judicial procedure. The procedure provided by the Secretary failed to provide such a hearing in that the function of adjudicating as to the basic and essential finding of fraud, concealment, or mis-

representation of material fact was delegated to the District Supervisor, in whom was also joined the function of prosecutor, and the provision for administrative review of his findings limited the Deputy Commissioner to the consideration as to whether there was substantial evidence to support the finding of the District Supervisor. Such a hearing procedure is fundamentally unfair.

Point II. Petitioner was Entitled to a Wholesaler's Basic Permit as a Matter of Right.

Since petitioner held an Importer's Basic Permit in May, 1935, petitioner was entitled to a Wholesaler's Basic Permit as a matter of right under the plain and unambiguous provisions of the Act. The administrative interpretation of the statute denying to petitioner such permit as a matter of right improperly engrafted a limitation upon the plain meaning of the statute.

ARGUMENT

I

Petitioner was denied the hearing to which it was entitled under Section 204(e) of the Federal Alcohol Administration Act.

The granting of a fair hearing is a prerequisite to the making of a valid order of annulment. The statute (Section 204(e)) provides that a basic permit "shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee * * * be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact". Under this Section the finding of the Secretary as to the existence of fraud, misrepresentation or concealment of material fact in the procurement of the permit is basic and essential to the exercise of the authority of the Secretary to annul.

All questions touching the regularity and validity of the proceeding before the Secretary are open to review. *Morgan* v. *United States,* 298 U. S. 468, 477, 80 L. Ed. 1288, 1293, 56 S. Ct. 906; *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274, 286-290, 68 L. Ed. 1016, 1021-1023, 44 S. Ct. 565; *Florida* v. *United States,* 282 U.S.194, 212-215, 75 L.Ed.291, 302-304, 51 S. Ct. 119. If the "opportunity for hearing to the permittee" required by the statute was not given, petitioner is entitled to have the orders annulling its permit set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a hearing and the orders are void if a hearing was denied. *Morgan* v. *United States,* 298 U. S. 468, 80 L.Ed.1288,56 S.Ct.906 *supra; Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, 91, 57 L. Ed. 431, 433, 33 S. Ct. 185; *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565, *supra; Florida* v. *United States,* 282 U. S. 194, 75 L.Ed.291,51 S.Ct. 119, *supra; United States* v. *Baltimore & O. R. Co.,* 293 U. S. 454, 464 79 L. Ed. 587, 594, 55 S. Ct. 268. The term "hearing" calls for a fair hearing as a minimal requirement. *Railroad Commission of California* v. *Pacific Gas & Electric Co.,* 302 U. S. 388, 82 L. Ed. 319, 58 S. Ct. 334; *Palko* v. *State of Connecticut,* 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149. The statutory requirement relates to substance and not form and see *Ashbacker Radio Corp.* v. *Federal Communications Commission,* U. S. Supreme Court, 1945 Term, No. 65, decided December 3, 1945, reported in 90 L. Ed. 119, 66 Sup. Ct. 148.

The annulment of a basic permit is not a function of ordinary administration, conformable to the standards governing duties of a purely executive character. The exercise of the power of annulment involves an action affecting rights

or property, in this case a business which had been conducted for nine years, employed 350 persons, and had an annual volume of $15,000,000. It was a matter not committed by law to absolute executive discretion. On the contrary, the Secretary, as the Agent of Congress in annulling a permit, must act in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the permit sought to be annulled "was procured through fraud, or misrepresentation, or concealment of material fact". If and when he so finds, only then may he annul the permit.

The duty of the Secretary in respect of such determination is of a quasi-judicial character and must be performed in the tradition and with the safeguards of judicial proceedings.

> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts has not considered evidence or argument, it is manifest that the hearing has not been given." Hughes, C. J., in *Morgan* v. *United States*, 298 U. S. 468, 480-481, 80 L. Ed. 1288, 1295, 56 S. Ct. 906.

Petitioner contends that the procedure prescribed and followed in annulment cases by the Alcohol Tax Unit, by uniting the prosecuting and adjudicating functions in the Deputy Supervisor, without provision for full review of his findings in the light of the weight of the evidence, just as a trial judge may set aside a jury's verdict on that ground, deprived the administrative procedure of a fundamental requirement of quasi-judicial proceedings.

Petitioner does not question the authority of the Secretary to delegate to subordinates the power to hear, determine and annul. It is recognized that administrative convenience requires such delegation. Petitioner concedes that the delegation by the Secretary of these functions to the Deputy Commissioner in Charge of the Alcohol Tax Unit was proper. Petitioner concedes that the further delegation of the powers and functions to the Deputy Supervisor, to be exercised subject to the supervision and control of the Deputy Commissioner, would also be proper were it not for the fact that the Deputy Commissioner was precluded from making a full review of the findings and recommendations of the District Supervisor, including weighing the evidence, deciding as to the credibility of witnesses, and drawing justifiable inferences from the evidence, all of which are functions inherent in the adjudicating process.

The administrative procedure prescribed in annulment cases and followed by respondents in annulling petitioner's permit in effect united the prosecuting function and the adjudicating function in the District Supervisor and constituted him the ultimate trier of the facts. Where the same men are obligated to serve both as prosecutors and as judges, judicial fairness is undermined, and public confidence in that fairness is weakened. Administrative decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the administrator, in the role of prosecutor, pre-

sented to himself. "Administrative Procedure": Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 674, S. 675 and S. 918, 77th Cong., 1st Sess. (1941) 1309.

The unfairness of such a procedure would be lessened if full court review of the findings were available, but the Act by its terms provides (Section 204(h)) that "the finding of the Secretary as to the facts if supported by substantial evidence, shall be conclusive".

This provision, as was held by the court below, renders the administrative findings of fact immune from judicial reversal if there was enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict (R. 349). Under this rule if what is called substantial evidence is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate. Under this interpretation they need read only one side of the case. If they find sufficient evidence to justify the submission of the facts to a jury the administrative action is to be sustained and the record to the contrary is to be ignored. See *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206, 84 L. Ed. 704, 60 Sup. Ct. 493; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 84 L. Ed. 1226, 60 Sup. Ct. 918.

The administrative process provided by the Treasury Department similarly limited the scope of review by the Deputy Commissioner of the finding of the District Supervisor. The Deputy Commissioner determined merely that the findings of the District Supervisor were supported by substantial evidence (R. 339).

In other words, annulment of petitioner's permit was based upon the determination of the prosecuting officer, the District Supervisor, as to the existence of fraud, misrepre-

sentation, or concealment of material fact in the procurement of the permit. That his findings were regarded by the Alcohol Tax Unit as in effect the findings of the Secretary required by the Statute is further shown by the fact that only in his order (R. 303) are the findings incorporated. The Statute provides (Sec. 204(e)) that "the order shall state the findings which are the basis for the order."

Petitioner contends that delegation by the Secretary of his duty to hear, determine and annul upon such terms was improper. It was contrary to fundamental ideas of fairness and justice, and robbed the "hearing" to which petitioner was entitled of substantial fairness, although a hearing in form was provided.

Since the scope of judicial review was limited by the statute, it was the obligation of the Treasury Department in carrying out the mandate of Congress, to furnish permittees an opportunity for a fair and adequate administrative hearing. It was a requirement of such a hearing that a fair and adequate opportunity be afforded for review of the decisions of the officer in whom were united the prosecuting and adjudicating functions.

In this connection it may be noted that the District Supervisor directed the Hearing Officer to make "such findings of fact as are in such case required by Sections 3100 to 3124, Internal Revenue Code and Article XIII of Regulation 3 (1942)" (R. 164). The Section of the Internal Revenue Code referred to relates to industrial alcohol plants, a distinctly different subject-matter. Section 3114, Internal Revenue Code, deals with the issuance and revocation of permits to manufacturers of industrial alcohol and Section 3114(c) provides that in case of a revocation of a permit the manufacturer may "by appropriate procedure in a court of equity have the action of the Commissioner reviewed, and the court may affirm, modify or reverse the finding of

the Commissioner as the facts and law of the case may warrant * * *."

In other words, it appears that there was applied in the proceedings to annul petitioner's permit a procedure appropriate to a situation in which there was opportunity for unfettered judicial review of both law and fact.

The hearing procedure must accord with present basic ideas of fairness. In discussions of administrative procedure the criticism is increasingly voiced that there ought to be a clear separation in such procedure between the prosecuting function and the adjudicating function, or, in other words, that those persons whose task and interest it has been to build up and make out a case against an individual, or under whose supervision such a case has been built up, ought not to sit in judgment to determine whether on the law and the facts a case has actually been made out. Dickinson, "The Acheson Report: A Novel Approach to Administrative Law", 90 U. Pa. L. Rev., 757, 765; "Administrative Procedure in Government Agencies": Report of the Committee on Administrative Procedure (submitted to Attorney-General Robert H. Jackson, Jan. 22, 1941, and transmitted by him to the Senate, Jan. 24, 1941) 55-60. Hereinafter Cited Report. See also "Additional Views and Recommendations of Mr. Chief Justice Groner, Report, 250.

In this connection, the remarks made by Senator Wayne L. Morse, in connection with certain proposed War Manpower Commission legislation, are suggestive here. Senator Morse said, in part, as follows:

> "There is growing up in this country a trend toward * * * administration of law by the executive branch of Government through administrative officers who, in my judgment, do not have their opinions and views sufficiently checked by other branches of Government. I think it is a dangerous trend.

"It is proposed that the man whose regulations may be challenged by a citizen * * * shall be given the power to set up his own tribunal to judge whether or not he, in fact, has been unreasonable in the exercise of his duties under the act.

"I think it is a very bad principle of government * * * to give the power to pass upon * * * regulations to a tribunal appointed by the administrator himself.

"As a result of my experience with some of the appeal tribunals * * * I have no illusion with regard to them, and I should like to prevent the repetition of such a mistake in this particular bill.

"We know how they would work in practice. We know that in practice the chairman of the War Manpower Commission would, by and large, call the shots under the proposed act. * * * I believe (this) irrespective of who occupies the position. I intend no personal reference. The citizen should have protection from the arbitrary exercise of power * * *." 44 Cong. Rec. 1950 et seq. (March 8, 1945).

The limited review afforded by the process of appeal to the Deputy Commissioner does not satisfy the requirements. The weighing of all the competent and relevant evidence by the Deputy Commissioner was a necessary part of his function of adjudication. In *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. (2d) 554, Stephens, J. said (at page 559):

"In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a Commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not,

as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion.

"The requirement that courts and administrative officers shall make findings of fact is far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law."

It has been repeatedly held that it is a fundamental requirement of a fair administrative hearing in an adversary proceeding that the material and competent evidence proffered by both sides be duly considered. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 64 L. Ed. 908, 40 Sup. Ct. 527; *National Labor Relations Board* v. *Union Pacific Stages,* 99 F. (2d) 153, 176; *National Labor Relations Board* v. *Thompson Products, Inc.,* 97 F. (2d) 13, 15; *National Labor Relations Board* v. *Sartoris & Co.,* 140 F. (2d) 203; *National Labor Relations Board* v. *Oneida Machine Tool & Die Co.,* 142 F. (2d) 163, 165; *Donnelly Garment Co.* v. *National Labor Relations Board,* (C. C. A. 8th, decided October 29, 1945, No. 12, 641).

It would be inappropriate to consider the adequacy of the evidentiary basis for the respondents' orders at this time and upon this record. It cannot be assumed that if the Deputy Commissioner in charge of the Alcohol Tax Unit had properly weighed and considered all of the competent and material evidence proffered by the petitioner and the Government, he would have made the same findings and order. *Donnelly Garment Co.* v. *National Labor Relations Board,* (C. C. A. 8th, decided October 29, 1945, No. 12, 641). The fact that the orders might be justified on the merits, even if true, would not obviate the requirement of a fair hearing, and recognition of this principle is essential in proceedings before administrative agencies. *Inland Steel Co.* v. *National Labor Relations Board,* 109 F. (2d) 9.

In view of the fact that annulment requires the finding of fraud and an order of annulment would destroy petitioner's established business, the Deputy Commissioner should be directed by this Court that such action should only be taken upon the clearest showing to him of fraud, concealment, or misrepresentation. The language of Judge Hutcheson, dissenting in *Atlanta Beer Distributing Co., Inc.* v. *Alexander, Federal Alcohol Administrator,* 93 F. (2d) 11, at 13, may well be considered in the instant case, as follows:

> "The result of the action of the Administrator, therefore, in, as appellant claims, arbitrarily refusing a permit is not to prevent applicant's entering into new business, but it is to take from it and destroy the established business and capital which it has already built up * * * I think that under the facts disclosed, the Administrator could not deny the permit except upon the clearest showing that one of the statutory grounds for refusing it existed."

This Court has recognized that there are situations in which administrative orders are required to meet a high standard of certainty. *North Carolina* v. *United States,* United States Supreme Court, 1944 Term, Nos. 560, 561, decided June 11, 1945, 89 L. Ed. 1287, 1290, 65 Sup. Ct. 1260; *Baumgartner* v. *United States,* 322 U. S. 665, 670, 88 L. Ed. 1525, 1529, 64 Sup. Ct. 1240. Petitioner submits that this case presents such a situation, in which the case made out by the Government must possess "that solidity of proof which leaves no troubling doubt."

II

Petitioner Was Entitled to Its Basic Permit as a Matter of Right

Before proceeding to a discussion of this contention petitioner wishes to call the Court's attention to the fact that the same contention was presented to the Court in the petition for certiorari filed in *Thomas J. Molloy Co., Inc.*, v. *Berkshire, et al.*, 143 F. (2d) 218, and that the Court denied certiorari in that case. 323 U. S. 802, 89 L. Ed. 478, 65 Sup. Ct. 559, rehearing denied 89 L. Ed. 689, 65 Sup. Ct. 711. However, petitioner respectfully requests this Court to re-examine its contention in the light of the argument now presented.

Section 204(a) of the Act sets forth in very clear and concise language the classes of persons entitled to permits thereunder. This section, supra, provides for two classes of such persons:—those who on May 25, 1935, held a basic permit as distiller, rectifier, wine producer or importer issued by an agency of the Federal Government (Sec. 204 (a)(1)); and—"Any other person," unless the Administrator finds such person fails to meet certain standards set forth in the act (Sec. 204(a)(2)).

Petitioner held on May 25, 1935, an Importer's Basic Permit issued by an agency of the Federal Government, and following the enactment of the Federal Alcohol Administration Act was duly re-issued its present Importer's Basic Permit under Section 204(a) of the Act.

The Government recognizes that one who held a basic permit on May 25, 1935, as a distiller, rectifier, wine producer or importer, issued by an agency of the Federal Government, was entitled as a matter of right to certain permits which were not subject to annulment under Section 204(e)(3) inasmuch as petitioner's Importer's Per-

mit was not included in the Order to Show Cause and no proceedings have been instituted to restrict in any manner petitioner's operations as an importer.

It is petitioner's contention that under the wording of Section 204(a) of the Act petitioner was entitled, as a matter of right upon application, to a basic permit as a wholesaler without further showing on its part. The mere possession of the Importer's Permit on May 25, 1935, and the filing of the application as required by the statute, compelled the Administrator to issue the Wholesaler's permit. It must follow that if petitioner was entitled to the Wholesaler's permit as a matter of right no question can arise as to whether such permit was issued through fraud, or misrepresentation, or concealment of material facts in the application.

A reading of the statute is sufficient to support the contention. Congress provided for two classes of persons to whom permits should be issued under the Act: first those who held permits by an agency of the Federal Government on May 25, 1935, and second, "All Other Persons." The language is clear and plain; no ambiguity exists and there is therefore no room for construction. *United States, et al.* v. *Missouri Pacific Railroad Company,* 278 U. S. 269, 73 L. Ed. 322, 49 Sup. Ct. 133; *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 88 L. Ed. 428, 64 Sup. Ct. 1215. A primary rule of statutory construction is that the intent of the lawmaker is to be found in the language used. (*U. S.* v. *Goldenberg,* 168 U. S. 95, 42 L. Ed. 394, 18 Sup. Ct. 3). There is no need here to refer to the reports of Congress or discussions of lawmakers at the time of the enactment of the law for it is obvious that one cannot be "any person who, on May 25, 1935, held a basic permit," and at the same time be "any other person."

In discussing provisions of the Interstate Commerce Act, Mr. Justice Butler in *United States, et al.* v. *Missouri Pacific Railroad Company, supra,* stated at page 277:

> "• • • Where doubts exist and construction is permissible, reports of the Committee of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed • • • (Citing cases.)"

Mr. Justice Frankfurter in discussing a regulation of the Administrator under the Fair Labor Standards Act which went beyond the intent of the statute said "• • • Nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is, therefore, to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*Addison* v. *Holly Hill Fruit Products,* supra.)

If, however, resort is had to the reports of congressional committees as the court below did in the *Molloy* case, *supra,* petitioner submits that there is nothing therein inconsistent with its position. The report of the Committee on Ways and Means on H. R. 8870 of July 17, 1938, stated (at p. 8):

> "All persons who held a basic permit issued under the code system and in full force and effect at the time

of the termination of that system as a result of the decision in the Schechter case, are, under the bill, entitled as a matter of right to permits issued under the new law when enacted, except in the case of wholesalers (Sec. 4(a)(1)). Wholesalers held only temporary basic permits at the time of the termination of the code system. The temporary basic permits were issued without the usual investigation. The other permittees under the code system were issued permits after they demonstrated that they did not have records as law violators and that by reason of their previous experience, financial standing, and trade connections they were potential legal members of the industry (H. Rept. 1542, Federal Alcohol Control Bill, July 17, 1935, p. 8)."

When this statement is read in its entirety it supports, rather than negatives, petitioner's position for it provides for the issuance of permits as a matter of right to all persons who held permits under the Code system, except a certain class, namely wholesalers who held only temporary basic permits at the time of the termination of the Code system. This is the only logical construction that can be placed upon the language for the report continues to state that such wholesalers were issued basic permits without the usual investigation and that "other permittees" were issued permits after they had demonstrated their rights to such permit. What did the Committee mean by "other permittees"? Obviously permittees other than those who held "only temporary basic permits".

Indeed any contrary construction of the state would result in "absurd and impractical consequences." It would, as in this case, result in the situation of permitting one to engage in the import business, which includes selling at wholesale, but of denying him the right to engage generally in the wholesale business.

In drafting Section 204(a)(2), Congress provided that persons who desired to enter the liquor business thereafter

should be subjected to the exercise of administrative discretion by an administrative officer, within certain limits specified in that section. Congress realized that many persons had already made substantial investments in the liquor business, following the exercise of a similar administrative discretion after investigation by a Federal agency, and sought by the wording of Section 204(a)(1) to protect those persons against the possible destruction of their business through exposure to the exercise of a second administrative discretion by a different administrative officer.

It cannot logically be presumed that Congress intended to create the situation presented by the facts in this case, namely that a person should be permitted to engage in the business of an importer (and likewise a distiller, rectifier, or wine producer) and at the same time be denied the privilege of engaging in business as a wholesaler. Nor can it be presumed that Congress felt there were special circumstances surrounding the business of a wholesaler of intoxicating liquors, separate and distinct from those pertaining to the business of a distiller, rectifier, wine producer or importer, inasmuch as each of these classes of permittees are engaged in wholesaling the products which they distill, rectify, produce or import. It naturally follows, therefore, that all of the activities and privileges to which a wholesaler is entitled under the basic permit are included among the activities and privileges covered by permits to distillers, rectifiers, wine producers, and importers.

It is petitioner's contention, therefore, that the wording of Section 204(a) is clear and not subject to any ambiguity, and that the statute should be interpreted so as to be given its plain and clear meaning. *United States* v. *Goldenberg, supra; De Ruiz* v. *De Ruiz*, 88 F (2d) 752. Petitioner was, therefore, entitled to its Wholesaler's Basic Permit, which is the subject of the annulment order hereunder reviewed,

as a matter of right and such permit was not subject to annulment under Section 204(e)(3) of the Act.

Conclusion

It is respectfully submitted that the petition herein for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit should be granted, and that the said judgment and decree should be reviewed, and that the orders annulling petitioner's basic permit as a wholesaler should be set aside.

Respectfully submitted,

JOSEPH P. TUMULTY, JR.,
Counsel for Petitioner.

APPENDIX

The following portions of the indicated sections of Article XIII, Regulations 3 (1942), United States Treasury Department, Bureau of Internal Revenue, are deemed pertinent to this petition.

Sec. 182.239. Hearing officers.—The Commissioner or district supervisor may conduct hearings, or may, in writing, designate and appoint some official or employee of the Treasury Department as a hearing officer to conduct and hold hearings and make findings of fact as hereinafter provided . . . .

Sec. 182.240. Grounds for citation.—The permittee shall be cited to appear at a hearing and show cause why his permit should not be revoked.

> (1) If at any time there shall be filed with the Commissioner or district supervisor a complaint, under oath, setting forth facts showing that the permittee . . . has made any false statement in the application therefor, or has wilfully failed to disclose any information required to be furnished . . . , or
>
> (2) Whenever the Commissioner or district supervisor has reason to believe, from facts coming officially to his knowledge from investigations and written reports made by an investigator, inspector, or other officer, that a permittee has violated any of the provisions in paragraph (1) above; . . .

Sec. 182.241. Citation.—All citations for revocation of permits must be signed by the Commissioner or district supervisor, as the case may be, but the Commissioner or district supervisor may in writing designate any officer under his jurisdiction to sign his name to any citation: *Provided,* That in no event shall a hearing officer be required to prepare or sign a citation in any particular case in which he will sit as hearer.

* * * * * * *

Sec. 182.253. Findings of the hearing officer.—Within a reasonable time after the conclusion of a hearing, the hearing officer shall render written findings of fact, in which he shall state briefly the issues of fact involved in the hearing, his conclusions thereon from the evidence adduced, and a summary of the evidence offered by both parties, and immediately transmit the original thereof, together with the original transcript of record, to the district supervisor or Commissioner, as the case may be.

Sec. 182.254. Order revoking permit or dismissing proceedings.—If the Commissioner or district supervisor, as the case may be, after consideration of the record of evidence taken at the hearing, approves the findings and conclusions of the hearing officer he shall make an order revoking the permit or dismissing the proceedings in accordance therewith. If he disapproves such findings or conclusions, he shall make such findings and order as in his opinion are warranted by the law and facts of the case. An original copy of the order made by the Commissioner or district supervisor, and a copy of the findings of the hearing officer, if they are approved, or a copy of the findings of the Commissioner or district supervisor, if the findings of the hearing officer are disapproved, shall be forwarded to the permittee or his attorney of record in the proceedings.

(*a*) *Notice to Commissioner.*—When the district supervisor makes an order revoking a permit, he will furnish a copy of the order to the Commissioner. Should such order be subsequently set aside upon reconsideration, or review by a court of equity, the district supervisor will so advise the Commissioner.

Sec. 182.255. Reconsideration of order revoking permit. —(*a*) *Time for filing application.*—Within 20 days after an order is made by the Commissioner or district supervisor revoking a basic permit, the permittee may file an application with such Commissioner or district supervisor, for a reconsideration of such order, on one or more of the following grounds:

(1) The order is contrary to law, or
(2) Is not supported by the evidence, or

(3) Because of newly discovered evidence which the permittee, with due diligence, was unable to produce at the hearing.

If the application is based on grounds (1) or (2), the permittee shall specify therein, by reference to the record, in what respects the order is contrary to law or is not supported by the evidence, as the case may be. If the application is based on ground (3), the permittee shall summarize therein the newly discovered evidence and set forth why he was unable to produce such evidence prior to the closing of the record.

(b) *Time of hearing.*—The Commissioner or district supervisor, with whom such application is filed, may hear the application on a date and at a place to be fixed by him. The Commissioner or district supervisor, as the case may be, after hearing such application, may either affirm the order of revocation previously made, or may vacate and set aside such order and dismiss the proceedings or order a new hearing of the evidence before a designated hearing officer.

(c) *Permit privileges.*—During the period above provided for filing application for reconsideration, and until final order is duly made after such reconsideration, if such application is filed within the time provided therefor, the permit involved shall continue in force and effect, except as to restrictions on withdrawals or transportation as may be ordered by the Commissioner or district supervisor, as provided in section 182.245.

* * * * * * *

Sec. 182.257. Appeal to the Commissioner.—Appeal to the Commissioner is not required. However, the Commissioner may, in his discretion, in order to insure uniformity of administrative action, entertain an appeal, after review and reconsideration as provided in section 182.255, from an order of revocation of a basic permit by a district supervisor, if filed with the Commissioner within 10 days of the date of the final order.

(a) *Petition.*—The petition for review must set forth facts tending to show action of an arbitrary nature, or of a

proceeding and action contrary to law or regulations. No objection to the final order of the district supervisor will be considered by the Commissioner unless such objection was urged before the district supervisor in the permittee's application for reconsideration, or unless reasonable grounds for failure to urge such objections are set forth in the petition for review.

(b) *Permit privileges.*—If such request is filed within the required time, the permit involved shall continue in force and effect until the final order by the Commissioner, except as to such restrictions upon withdrawals or transportation as may be imposed by the district supervisor, as provided in section 182.245.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 721

CAPITOL WINE AND SPIRIT CORPORATION, PETITIONER

v.

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 346–350) is reported in 150 F. 2d 619.

JURISDICTION

The order sought to be reviewed was entered October 8, 1945 (R. 359). The petition for a writ of certiorari was filed January 7, 1946. The jurisdiction of this Court is invoked under Section 4 (h) of the Federal Alcohol Administration Act, 49 Stat. 977, 27 U. S. C. 204 (h), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair hearing.

2. Whether there is presented the question of petitioner's right to a wholesaler's basic permit under Section 4 (a) (1) of the Federal Alcohol Administration Act.

STATUTE INVOLVED

Section 4 of the Federal Alcohol Administration Act, 49 Stat. 977 (27 U. S. C. 204), provides in part as follows:

> (a) The following persons shall, on application therefor, be entitled to a basic permit:
>
> (1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.
>
> (2) Any other person unless the Administrator finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in

conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) If upon examination of any application for a basic permit the Administrator has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Administrator, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

(c) The Administrator shall prescribe the manner and form of all applications for basic permits (including the facts to be set forth therein) and the form of all basic permits, and shall specify in any basic permit the authority conferred by the permit and the conditions thereof in accordance with the provisions of this Act. To the extent deemed necessary by the Administrator for the efficient administration of this Act, separate applications and permits shall be required by the Administrator with respect to distilled spirits, wine, and malt beverages, and the various classes thereof, and with respect to the various classes of persons entitled to permits hereunder. The issuance of a basic permit under this Act shall not operate to deprive the United

States of its remedy for any violation of law.

* * * * *

(e) A basic permit shall by order of the Administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate, if the Administrator finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Administrator finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Administrator finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

Reorganization Plan No. III (54 Stat. 1231); prepared pursuant to the Reorganization Act of 1939 (53 Stat. 561), which became effective June 30, 1940, by Joint Resolution of June 4, 1940 (54 Stat. 230, 231), provided that the functions of the Administrator under the Federal Alcohol Administration Act "shall be administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue in the Department of the Treasury." The Secretary of the Treasury delegated the functions of the Administrator "to the Deputy

Commissioner of the Bureau of Internal Revenue in charge of the Alcohol Tax Unit, to be exercised by him under the direction and supervision of the Commissioner of Internal Revenue and the Secretary of the Treasury" (Treasury Department Order No. 30, 5 Fed. Reg. 2212). Subsequently these same powers were also delegated to the District Supervisors of the Alcohol Tax Unit, to be exercised by them subject to the supervision and direction of the Deputy Commissioner (Treasury Decision 4982, 5 Reg. 2549).

STATEMENT

The Federal Alcohol Administration Act was enacted August 29, 1935. Section 4 (a) (1) of the Act provides that any person who, on May 25, 1935, held a basic permit as a distiller, rectifier, wine producer or importer issued by an agency of the Federal Government, is entitled to a basic permit. In October 1935 this provision was administratively construed by a duly promulgated regulation to entitle such an applicant to a basic permit of the same type as that which the applicant held on May 25, 1935 (27 C. F. R. 4, 2). Under this construction no one, including a person who had held other types of basic permits on May 25, 1935, could obtain a wholesaler's [1] basic

[1] Prior to the passage of the Federal Alcohol Administration Act wholesalers were not required to obtain basic permits from the Federal Alcohol Control Administration (established under the National Industrial Recovery Act), although such basic permits were required of distillers, rectifiers, wine producers and importers.

permit under Section 4 (a) (2) if he (or in case of a corporation, any of its officers, directors, or principal stockholders) had, within five years been convicted of a felony under Federal or State law; or had, within three years, been convicted of a misdemeanor under any Federal law relating to liquor; or if such person was, by reason of his business experience, financial standing or trade connections, not likely to maintain such operations in conformity with Federal law.

In January 1936 petitioner, which had held an importer's permit on May 25, 1935, applied for a wholesaler's basic permit (R. 175) in the manner and form prescribed by the Administrator under the authority of Section 4 (c) of the Act (R. 176–195). The applicable instructions required information, in affidavit form, from which the Administrator could determine the eligibility of the applicant, including information as to the identity of the persons who owned and managed the applicant; their prior connections, if any, with the liquor industry; and whether the applicant or any of its directors, officers or stockholders owning 10 percent or more of the capital stock had been convicted of a felony within five years or of a misdemeanor under a Federal law relating to liquor within three years prior to the application (R. 176–182). Petitioner could then have furnished true information and, upon denial of its application, sought judicial review under Section 4 (b) of the order of denial and of the adminis-

trative construction of Section 4 (a) (1) of which it now complains. Petitioner, however, did not do this but falsified its application by failing to reveal its three actual owners, the bootlegging background of two of them, and the conviction of one of those two of a felony under the Prohibition Act (R. 304–306, R. 349–350). On the basis of this application, and without a hearing, the Administrator in July 1936 issued petitioner a wholesaler's basic permit (R. 196–197).

On January 4, 1943, District Supervisor Griffin [2] "having reason to believe" that petitioner had procured its wholesaler's basic permit by fraud, misrepresentation, or concealment of material facts, issued an order to show cause why the wholesaler's permit should not be annulled under the provisions of Section 4 (e) (3) of the Act (R. 165–170). Some time thereafter respondent District Supervisor Rhees, who suceeded Mr. Griffin upon the latter's death, designated a hearing officer (R. 164) and extended hearings were held. At the conclusion of these hearings, the hearing officer found that petitioner had misrepresented to and concealed from the Administrator material facts in obtaining its wholesaler's permit and recommended its annulment (R. 257–302). An order of annulment was entered by District Su-

[2] In the interval between the issuance of petitioner's wholesaler's permit and the institution of the annulment proceedings, the powers vested in the Administrator by the Act had been delegated to, among others, the various District Supervisors of the Alcohol Tax Unit, *supra*, pp. 4–5.

pervisor Rhees on October 11, 1943 (R. 303–306). An application for reconsideration (R. 307–319) was granted and the order sustained after argument before the District Supervisor (R. 320, 322–323).[3] Petitioner thereupon filed with the Deputy Commissioner of Internal Revenue a petition for review (R. 325–337). After considering the administrative record and hearing oral argument by counsel for petitioner, the Deputy Commissioner affirmed the order of annulment (R. 338–339). Petitioner then appealed to the Circuit Court of Appeals for the Second Circuit which rendered a decision affirming the order of annulment (R. 346–350), denied an appication for rehearing (R. 351–352, 357), and entered an order of affirmance (R. 359).

ARGUMENT

I

Petitioner contends that it was deprived of a fair hearing because the District Supervisor, the trier of fact, was "clothed with the functions of instituting annulment proceedings, after forming an opinion that good cause for annulment exists, and of prosecuting annulment cases" (Pet. 13). The lack of substance in this contention is suggested by the absence of any citation of supporting authority despite the union of these functions in a large proportion of the older Federal ad-

[3] Under the statute and regulations, the order of annulment is stayed pending administrative and judicial review.

ministrative agencies. See, for example, Federal Trade Commission Act, 38 Stat. 717, 719, 15 U. S. C. 45b; Clayton Act, 38 Stat. 730, 734, 15 U. S. C. 21; Securities and Exchange Act of 1934, as amended, 48 Stat. 881, 49 Stat. 1375, 1376; 15 U. S. C. 78l (f); National Labor Relations Act, 49 Stat. 449, 453, 29 U. S. C. 160b; Communications Act of 1934, 48 Stat. 1064, 1072, 47 U. S. C. 205; Packers and Stockyards Act, 42 Stat. 159, 166, 7 U. S. C. 211, which was before the Court in *Morgan* v. *United States*, 298 U. S. 468, 304 U. S. 1, referred to by petitioner.

Even if there might be in practice, under certain circumstances, such a close union of these functions as to create as a matter of law or fact a disqualifying bias in the administrative officer or agency, petitioner has not shown the existence of any such bias in the present case. The record shows only that District Supervisor Griffin issued the order to show cause why petitioner's wholesaler's basic permit should not be annulled (R. 165–170) and furnished a bill of particulars (R. 172–174); that Mr. Griffin's successor, District Supervisor Rhees, appointed a hearing officer (R. 164); that both sides were represented by counsel, who introduced oral and documentary testimony and examined and cross-examined witnesses; that the hearing officer made a report to District Supervisor Rhees (R. 257–302), who issued the order of annulment (R. 303–306), which was, on application, reconsidered by the District

Supervisor (R. 308–321) and reviewed for errors by the Deputy Commissioner (R. 338) and by the Circuit Court of Appeals for the Second Circuit (R. 346–359). Other facts material to the issue are not contained in the record[4] because the petitioner did not contend before the District Supervisor (R. 308–319), the Deputy Commissioner (R. 325–336), or the Court of Appeals (R. a–n) that it was deprived of a fair hearing. Section 4 (h) of the Act provides that: "No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do." It is submitted that under these circumstances no question calling for review by this Court is presented by this aspect of the petition for certiorari.

II

Petitioner contends that the Administrator erred in construing Section 4 (a) (1) as only permitting the issuance of "grandfather" basic permits for the same operations as to which basic permits had previously been issued by the Federal Alcohol Control Administration. This question has been considered only by the Circuit Court of

[4] Petitioner erroneously states that the hearing officer and the attorney representing the Government in the administrative hearings were attorneys on the staff of respondent Rhees (Pet. 3). Both of them were on the staff of the general counsel of the Treasury Department and subject neither to the control nor supervision of the District Supervisor.

Appeals for the Second Circuit. It was first urged, upon almost identical facts, in *Thomas J. Molloy & Co.* v. *Berkshire,* 143 F. 2d 218, and was rejected in an opinion which adequately disposes of the question on the merits. It was also urged in an unsuccessful application for a writ of certiorari in that case, 323 U. S. 802. In these circumstances it seems unnecessary to discuss the question of statutory construction further here.

In opposing the application in that case the Government contended, as it does here, that petitioner had no standing to present the question of the construction of Section 4 (a) (1). Petitioner has argued the propriety of the administrative action in this record as though it were appealing from a denial of a permit on the ground that it was legally unfit to hold one, whereas it is, in fact, contesting the annulment of a permit on the ground that it was obtained by illegal means. It is no longer disputed that the permit was obtained without a hearing by misrepresenting facts which both the Administrator of the Act and the petitioner at the time of issuance believed to be material. The only claim of immateriality is that under a different construction of the statute than that adopted by the Administrator and acquiesced in by the petitioner at that time, the petitioner might have obtained the permit as a matter of right.

Petitioner now seeks a review by this Court of a construction of Section 4 (a) which was adhered to by all parties when the permit was issued, although the sole purpose of this proceeding is to determine whether or not petitioner had fraudulently procured the permit within the meaning of Section 4 (e) (3). No legislative history, court decisions or legal materials have been cited by petitioner to suggest that Section 4 (e) (3) means anything other than what it says. The policy embodied in this section of the Act is simply one aspect of the general policy of the Government to require those who seek benefits from it to make honest statements in procuring them. The basic statute embodying this requirement is Section 35 (A) of the Criminal Code, 18 U. S. C. 80, originally passed in 1909 to punish criminally the making of false claims but broadened in 1934 to include the willful making or using of any fraudulent statements in matters over which a federal agency has jurisdiction. In *United States* v. *Gilliland,* 312 U. S. 86, 93, the Court said that this amendment "indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." In carrying out this policy, Congress has frequently resorted to statutory provisions, such as Section 4 (e) (3), which deprive persons of the specific benefits pro-

cured by dishonest statements to particular governmental agencies.[5]

That petitioner has no right to a review of the Administrator's construction of Section 4 (a) in this proceeding is established by *United States* v. *Kapp,* 302 U. S. 214, and *Kay* v. *United States,* 303 U. S. 1. In the former case, the Court held that a defendant charged with conspiring to violate Section 35 (A) of the Criminal Code by making fraudulent representations in order to procure benefit payments under the Agricultural Adjustment Act of 1933 could not question the authority of the Secretary of Agriculture to require the furnishing of the information in question even though the Act which granted it had been declared unconstitutional in *United States* v. *Butler,* 297 U. S. 1. In so holding the Court said (p. 218):

> It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government.

In the *Kay* case the Court held that the constitutionality of the Home Owners' Loan Act was

[5] Cf. 30 U. S. C. 227, punishing fraud or dishonest conduct in procuring leases on Navy petroleum reserves by depriving persons guilty thereof of the benefits of such leases; 45 U. S. C. 354, punishing the making or aiding in making of fraudulent statements to procure railroad unemployment insurance benefits by depriving persons guilty thereof of such benefits.

immune against attack in a proceeding charging a violation of Section 8 (a) of that Act, 12 U. S. C. sec. 1467 (a), which punishes the making of false representations for the purpose of influencing action on a loan application. In so holding, the Court said (p. 6):

> There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

A fortiori, one who misleads an administrative officer of the Government by false statements has no standing to assert that the proceeding in which the statements were made was without statutory sanction.

CONCLUSION

The decision below is correct and no question of statutory construction is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
HERBERT BORKLAND,
MATTHIAS N. ORFIELD,
Special Assistants to the Attorney General.

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No. 721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

CAPITOL WINE & SPIRIT CORPORATION, *Petitioner*,

v.

STEWART BERKSHIRE, As Deputy Commissioner of the Bureau of Internal Revenue, et al.

PETITION FOR A RE-HEARING AND FOR LEAVE TO FILE BRIEF IN ANSWER TO BRIEF OF DEFENDANT.

JOSEPH P. TUMULTY, JR.,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Capitol Wine & Spirit Corporation, respectfully prays that the Court grant a rehearing of this case and also grant leave to the petitioner to file a brief in answer to the brief of the defendant filed herein.

There are a number of points raised in the brief of the defendant which the petitioner feels should be answered, which it does not believe have been presented to the Court in the original petition for writ of certiorari filed herein, and which should be called to the attention of the Court.

Respectfully submitted,

JOSEPH P. TUMULTY, JR.,
Counsel for Petitioner.

Joseph P. Tumulty, Jr., certifies that the foregoing petition by him signed is filed in good faith and not for delay.

JOSEPH P. TUMULTY, JR.